PUBLIC PROSECUTOR

v.

LEE CHEE MENG & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CRIMINAL TRIAL NO. 58-14-87]
13 AUGUST 1990

CRIMINAL PROCEDURE: *Cautioned statement - Admissibility - Threats - Non-compliance with form - Lack of comma after word "tidak" Exclusive user - Section 37B Dangerous Drugs Act 1952 - Common intention - Meeting of minds - Section 34 Penal Code.*

Both accused A & B, were charged with the trafficking of the drugs, heroin and monoacetylmorphine, M under s. 39B(1)(a) of the Dangerous Drug Act 1952 (the Act). The incriminating drugs were found in a shoe box in a room occupied by the 1st accused A.

The issues for the Court were the admissibility of a cautioned statement from the 1st accused, possession and knowledge and exclusive user.

Held:

[1] The cautioned statement was inadmissible as it was not made voluntarily because of threats, failure to observe the lock-up rules, lack of statement that the 1st accused understood the caution administered to him, the presence of certain officers during the wording of the statement and the different meanings which were possible as a result of lack of a comma after the word "tidak".

[2] In relation to the offence under s. 34 of the Code, the prosecution had failed to prove the fact of common intention as there was no evidence to refer that the A & B had a prior meeting of the minds for the commission of the said crime.

[3] Since the 1st accused was a sub-tenant to the said room and since he had the care and management of the said room, he is presumed to be an occupier under s. 37(b) of the Act; the term "exclusive right" must be determined in relation to the facts of each individual case.

[1st accused found guilty. 2nd accused acquitted and discharged.]

Cases referred to:
Mahbub Shah v. King Emperor [1945] 1 A Vol Lxxii 148
Namasiyiam & Ors. v. Public Prosecutor [1987] CLJ (Rep) 241
Public Prosecutor v. Aris bin Yunos [1989] 2 CLJ (Rep) 289
Public Prosecutor v. Chong Wei Kian [1990] 2 CLJ (Rep) 690

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(b),(d),(da),(g), 39B(1)(a), 39B(2)
Penal Code, s. 34

For the prosecution - Hadariah bte Syed Ismail, Deputy Public Prosecutor
For the accused - Teh Poh Teik; M/s. Abdul Rahman Saad & Associates

JUDGMENT

James Foong JC:

The 1st and 2nd accused are jointly charged under an amended charge which reads as follows:

Bahawa kamu bersama-sama pada 14 Mei 1986 lebih kurang jam 10.50 pagi, di tingkat dua rumah No. 54-B, Jalan Perang, Taman Pelangi, Johor Bahru, di dalam daerah Johor Bahru, dalam Negeri Johor, telah didapati mengedar dadah berbahaya iaitu 23.71 grams campuran heroin dan monoacetylmorphine bagi pihak diri sendiri dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Merbahaya 1952 dan boleh di hukum di bawah seksyen 39B(2) Akta yang sama.

The facts of this case are briefly as follows:

On 14 May 1986 at or about 10.50 a.m. Inspector Jasbir Singh (PW2) together with his men namely D/C Muda, D/C Wahid and D/C Asaari raided a room shown as room B in the sketch plan produced and marked by the Court as P29. This room was situated at the rear portion of a flat in a 3 storey shophouse known as 54-B, Jalan Perang, Taman Pelangi, Johor Bahru.

Inspector Jasbir Singh and his men gained entry to the flat from one person by the name of Loke Kow Chai whom they met at the ground floor of the said shophouse.

Upon entering the flat No. 54-B, Jalan Perang, they proceeded straight to room B. After knocking on the door, a male Chinese identified as the 1st accused opened the door. Inspector Jasbir Singh and his police party noticed a female Chinese was also sleeping in this said room at the material time. This female Chinese was identified as the 2nd accused.

Upon entering the room Inspector Jasbir Singh found on top of the plastic cupboard a rotan case (P3) normally used as a vanity case by women. In this rotan case he found therein;

1. wrapped in newspaper 10 plastic packets (P5) containing substance suspected of drugs.
2. 4 lipsticks
3. 1 eye shadow box
4. 1 tube of lip conditioner
5. 6 card calendars
6. 1 small purse containing RM3.25

Upon a search of the room, D/C Asaari (PW3) found 2 black shoe boxes which were then immediately handed over to Inspector Jasbir Singh. Inspector Jasbir Singh found in one shoe box (P11) the following items;

1. 1 red plastic bag which had 26 small plastic packets (P13) wherein each of them contained substance suspected of drugs.
2. 25 plastic packets (P14) wherein each of them contained substance suspected of drugs.

In the other shoe box (P15) the following items were found by Inspector Jasbir Singh;

1. 4 candles (P16)
2. 1 spoon (P17)
3. 1 foldable pen knife (P18)
4. 117 empty plastic bags (P19)

From the plastic cupboard the police party recovered the following items;

1. One restricted passport (P26) in the name of 1st accused.
2. One bunch (P27) of 3 keys

3. 1 padlock lock with a key inserted in it (P28)
4. 7 shirts (P21)
5. 3 T-shirts (P22)
6. 1 sweater (P23)
7. 3 trousers (P24)
8. 1 blue skirt (P25)

The 1st and 2nd accused were then arrested and brought back to the police station.

At the same time of the raid in room B, a raid in room A as indicated in the sketch plan (P29) was also carried out. In that room which was occupied by one Yoong Thien Soong (who was constantly produced and identified during the period of this trial), Inspector Jasbir Singh found 4 packets suspected to be drugs. This Yoong Thien Soong was also arrested. He was subsequently charged for a drug offence in the subordinate Courts in Johore Bahru where he pleaded guilty and was sentenced to a year in jail.

The investigating officer of this case with which the 1st and 2nd accused are charged is ASP Govindan (PW6). He testified that he went to the scene of the crime on the same day together with the 1st accused and three other police personnel which included the photographer.

Sad to say the investigation relating to the nature of the door to room B was lacking. No pictures were taken of the front side of the door nor were there detailed descriptions from PW6 of how the nature of the door and the manner it could be locked from the inside and outside of the room. This leaves all parties baffled and in search of evidence as to how the door could be locked from the outside from the testimonies of other witnesses. This is an important piece of information which was relied on by both prosecution and the defence.

The exhibits suspected to be drugs were sent to the chemistry department. The chemist PW5 testified that the exhibits send to him for analysis contained 20.28 grammes of heroin and 3.43 grammes of monoacetyle morphine. These 2 drugs are listed as dangerous drugs under the Dangerous Drugs Act 1952.

The 1st and 2nd accused were also on the same day of the arrest sent to the Sultanah Aminah Hospital for urine test and no traces of drugs were found on them.

The prosecution's last witness was one Inspector Nordin Kadir who testified that he recorded a cautioned statement from the 1st accused. The Counsel for the 1st and 2nd accused objected to its admissibility. Due to this a '*voire dire*' proceeding was held and after the same was completed I ruled that the cautioned statement is inadmissible.

My reasons for its inadmissibility is based on my finding that the cautioned statement was not made voluntarily.

1. The 1st accused was subject to threats and beating by police personnel before the cautioned statement was recorded. There was evidence that the recording officer himself had threatened the accused before recording the cautioned statement.
2. The police have failed to observe the Lock Up Rules and had taken the 1st accused outside resting hours for questioning.
3. The cautioned statement does not contain any statement in the form and answer manner that the 1st accused understood the caution administered to him.

4. There was no comma after the word "tidak" in the caution, thereby two different meanings could be referred to in the caution.

5. There was evidence that both the recording officer and the translator were present in the investigation of this case.

At the end of the prosecution's case, I found that the prosecution had proved a *prima facie* case against the 1st accused and the presumptions under s. 37(b),(d),(da) and (g) of the Dangerous Drugs Act were invoked against him and the 1st accused was called upon to make his defence.

As for the 2nd accused, I find that the prosecution has not proved a *prima facie* case against her.

The 2nd accused is charged together with the 1st accused to commit a crime with common intention under s. 34 of the Penal Code.

In order for this charge against her to succeed the prosecution must prove 2 elements;

1. she was either committing the crime or at the scene of the crime and

2. there must be evidence of a common intention.

As clearly stated in the celebrated case of *Mahbub Shah v. King Emperor* [1945] 1 A Vol Lxxii 148 there must be "a pre arranged plan" and the crime must be "done" in concert pursuant to the pre-arranged plan." Justice Barakbah in *Namasiyiam and others v. Public Prosecutor* [1987] CLJ (Rep) 241 called this common intention "a prior meeting of the minds and presupposes some prior concert."

From the evidence before me, I find that the prosecution has failed to prove this fact of common intention. There was no evidence to infer that the 1st accused and 2nd accused had a prior meeting of the minds to commit the said crime.

The 2nd accused was in fact a girlfriend of the accused who visited the 1st accused occasionally. She had her own place of residence at No. 7, Jalan Tombak, Taman Tebrau, Johor Bahru. This was in fact visited and confirmed by ASP Govindan.

Besides the blue skirt, there were no exhibits found in the said room B that the prosecution can prove to belong to the 2nd accused. Inspector Jasbir Singh said he found an identity card bearing the name of the 2nd accused in the rotan case but, this identity card was not tendered in Court. In fact the prosecution's witnesses were so embarrassed when they could not produce this identity card in Court which Inspector Jasbir Singh alleged that he had found.

I also find that the 2nd accused was not an occupier of the room B and has no care and control of the same. The presumptions of s. 37(b) of the Dangerous Drugs Act cannot therefore apply to her. Neither is there any evidence to show that the 2nd accused was in possession of the drugs. The 2nd accused, from the evidence adduced to this stage only shows that she was a girlfriend of the 1st accused and she happened to have spent a night with the 1st accused in the said room when the police raided the place.

Under such circumstances I acquitted and discharged the 2nd accused without having to call upon her to make her defence.

The 1st accused after an amended charge to delete the common intention to commit the crime jointly with the 2nd accused pleaded not guilty to the amended charge and proceeded to give evidence on oath at the witness stand.

The 1st accused's defence is mainly based on the following:

a) that the drugs found in room B did not belong to him and he had no knowledge of the said drugs and

b) he was not the exclusive user of the said room since his friends frequented the place,

c) that the door to room B was not locked at all material times and as such his friends and or any other person or persons could have access to the room and thereby could have placed the drugs there.

The accused stated that he rented room B at the same time with Yoong Thien Soong who took room A. Each was given their respective set of keys, one to the grille, the other to the main door of the flat and the last one to the door of their respective rooms.

The door knob with lock to room B was already spoilt and from the photographs (Exhibit P2) the door knob was already removed from the door when the 1st accused moved into room B. From the inside of room B the door was locked with a latch. From the outside, it can be locked with a padlock attached to a padlock latch. The 1st accused was supplied with a padlock with key to lock his door by the chief tenant. However, according to the 1st accused, about a few weeks after he moved into the room he lost his padlock key and had to forcefully remove the padlock to gain entry. Ever since then, he had not padlocked his room when he went out.

The 1st accused, according to his evidence had a number of friends, namely his neighbour Yoong Thien Soong (the occupant of room A), Kenny, Ah Fun, Ah Tuan and Kucing. These friends frequented his room because he had an air cooler and a mini compo player in his room. There they will chit chat or read newspapers and magazines. However, they also frequented Yoong Thien Soong's room A.

The 1st accused said that he worked as a partner in charge of checking stock in a hair-dressing saloon called "Smart Unisex Saloon" together with a person called Ah Yap (DW2) and one other. DW2 did testify that there were occasions he saw the 1st accused handing over to Kenny or Yoong Thien Soong his keys to his room B when these 2 persons came to the hairsaloon to request it from the 1st accused.

The 2nd accused after being acquitted and discharged by this Court also testified for the defence that she knew all the above mentioned friends of the 1st accused and had seen them in the 1st accused's room, when she was taken there by the 1st accused.

In his submission, the learned Counsel for the 1st accused reminded this Court, that all the 1st accused has to do is to tender evidence which on the balance of probability (similar to that of a civil case) would have rebutted the prosecution's case. Bearing in mind, what was submitted aforesaid, I still find that the 1st accused has failed to rebut the presumptions against him as laid down under s. 37 of the Dangerous Drugs Act 1952.

I find that the 1st accused was a sub-tenant to room B of the said premises. In fact he never disputed this fact. As he had the care and management of the said room, he is presumed to be an occupier of the same under s. 37(b) of the Dangerous Drugs Act 1952.

The next question one has to ask is, were the drugs concealed? I answered this in the affirmative since they were kept in a shoe box and in a rotan case. They were not displayed or placed openly in the said room. Such being the case s. 37(g) of the Dangerous Drugs Act

1952 applies. Section 37(g) states that "if any dangerous drug is found concealed in any premises, it shall be presumed, until the contrary is proved that the said drugs is so concealed with the knowledge of the occupier of the premises."

I find it not probable that the 1st accused never locked his room when he went out. The 1st accused was not residing in a house with his family members or persons he knew and trusted where there was no necessity to lock one's room. In fact there is no evidence that he even knew the occupants of room J which was the front room rented to 3 males. With a mini compo and air cooler which were valuable items I cannot accept his contention that he never locked his room door to prevent theft in the light of such circumstances.

I find it strange that the 1st accused said that he never padlocked the door since the day he lost his key. The latch for the padlock was there and according to his evidence he said a padlock could be used. He had used a padlock before and when the key was lost, he could have purchased another one. There was in fact a padlock found by Inspector Jasbir Singh in the cupboard of the room and produced in Court as P28 of which could be used to padlock the door.

There is also evidence to state that the grille and the main door to the premises 54-B, Jalan Perang required keys to be opened. If such places were locked certainly it infers security was indeed.

I also find that the said door to room B was locked from the evidence of Ah Yap (DW2) when he said that Kenny and Yoong Thien Soong occasionally came to the saloon to take the keys to open the 1st accused's room. Since Yoong Thien Soong was also a resident in 54-B, Jalan Perang why did he need to come to collect keys from 1st accused? He would have his own keys to gain entry to premises 54-B, Jalan Perang. This infers that he needed the key to open the 1st accused's room B.

The learned Counsel for the 1st accused quoted me the decision of Mr. Justice Shanker in the case of *Public Prosecutor v. Aris bin Yunos* [1989] 2 CLJ (Rep) 289 and that of my decision in *Public Prosecutor v. Chong Wei Kian* [1990] 2 CLJ (Rep) 690 where decisions were made relating to the "exclusive right" to the use of the premises or room. I like to stress that "exclusive right" must be viewed in the light of all circumstances of each particular case. It does not mean that once the accused person tendered evidence that some of his friends entered the room with or without his permission it is sufficient evidence to say that the drugs found therein did not belong to the accused and that he has lost his exclusive use of the room. All the facts of each case must be viewed separately to determine the element of exclusive right.

As in this case I find that the 1st accused had still the care and custody of the things in his said room when the place was raided by the police. There was no evidence by the 1st accused that his friends were in his room the night before or the days before nor were there any evidence by him that his friends took his keys just before the police raid. If the 1st accused had lost the exclusive right to the room, it was only for a temporary nature and he has regained it when he returned. He was there in the room with his girlfriend for the whole night and he would have been aware of what was contained therein especially in a room which furniture consists of only the plastic cupboard, the mattress, the mini compo, the air cooler and the shoe boxes.

The 1st accused admitted that the two shoe boxes belonged to him and he could have disposed of the same. I find it unacceptable when the 1st accused stated that he was not aware of the contents therein. He had ample opportunity to look into it and was not curious according to him to do so. The presence of these shoe boxes was evidently meant for some specific purposes as no other containers or pieces of like furniture for storage were found in the room. As it was meant for specific purposes and not thrown away, the accused should be concerned of what was contained therein. When the room is small, there would be more occasions for the 1st accused to look into it most of the time.

Under all the circumstances as stated above I find that the 1st accused has not rebutted the various presumptions stated earlier under the Dangerous Drugs Act 1952 and neither has he rebutted the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952 when the drug so found exceeded 15 grammes in weight.

I therefore find the 1st accused guilty of the amended charge.

Also found at [1990] 2 CLJ 813